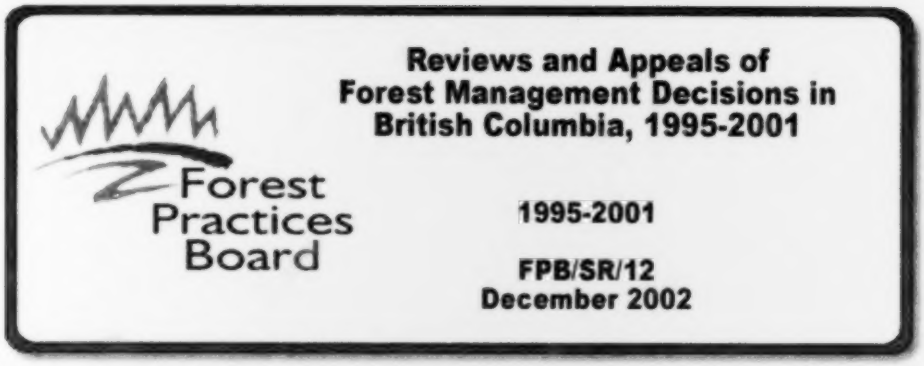


(Click here for PDF version)

Letter of Introduction

This special report has been prepared under section 189(3) of the Forest Practices Code, which permits the Chair of the Board to report to the Code ministers (Forests; Sustainable Resource Management; Water, Land and Air Protection; and Energy and Mines) and the public about issues arising from the Board's work in audits or complaint investigations. I would like to thank Board staff for their work in assembling this information and preparing this special report under my direction - in particular, Calvin Sandborn and Jacqueline Waldorf. Any errors or omissions are my responsibility.

Forest Practices Board

In addition to audits and investigations of complaints, the Forest Practices Board Chair can undertake special reports to the public and four ministers (Forests; Energy and Mines; Water, Land and Air Protection; and Sustainable Resource Management) about matters relating to the Board's duties and important forestry issues related to the Code. Board members choose the scope and subject of the reports, which are often sparked by observations in

The introduction of the Forest Practices Code of British Columbia Act in 1995 created the Forest Practices Board as an independent watchdog over forest practices. Its mandate is to audit forest practices, investigate complaints from the public about forest practices, report to the public on forest practices issues and, if the Board thought a forest development plan was wrongly approved or a decision by a statutory decision-maker was made in error, to request that it be reviewed or appealed.

New forestry legislation, the *Forest and Range Practices Act*, was introduced in November 2002. The Board's mandate under the new legislation is essentially unchanged from that of the preceding legislation. Government has reaffirmed the role of the Board in appealing administrative remedy decisions and approvals of forest stewardship plans (which replace forest development plans under the new Act).

the course of regular audits, investigations, reviews and appeals.

In many respects, reviews and appeals deal with issues similar to those found in investigations. There are key differences:

- When investigating and auditing, the Board does not take a position. s When pursuing an administrative review or an appeal, the Board acts as an advocate.
- Administrative reviews may lead to an appeal before the Forest Appeals Commission (FAC).
- Decisions by review panels and the FAC are legally binding (they change an order or decision), whereas Board investigations and audits make non-binding recommendations.
- Evidence presented to an administrative review, or an appeal, must be confined to the legal issue in dispute. The scope of Board reports is broader.
- If a decision being challenged has not been implemented, the Board's intervention in a review or appeal may result in a forest practice being changed or stopped.

While FAC rulings are not considered by legislation to be precedent setting, they are highly persuasive. Outcomes of these cases garner strong interest from the industry groups, advocacy groups and government agencies woven into British Columbia's forest management tapestry.

This report follows similar summary reports about audits and investigations, and details the Board's experience with administrative reviews and appeals from 1995 through 2001. Our summary report allows the reader to assess the variety of reviews and appeals argued by the Board, the source of the concerns behind the reviews and appeals, and the trends emerging as a consequence.

Bill Cafferata
Chair, Forest Practices Board

Back to top

The Board's Role in Administrative Reviews and Appeals

Just as companies can appeal fines and government orders, the Forest Practices Board can appeal both government decisions and the failure to make decisions. The Board also has a unique right to request reviews of forest development plan (FDP) approvals under the Forest Practices Code where it is in the public interest to do so. In addition, the Board can become a party to appeals launched by others.

The Board's role in reviews and appeals is different from the impartial role it plays in audits and complaint investigations. Here, the Board acts as an advocate for the public interest, asking the review panels and the independent Forest Appeals Commission (FAC) to make decisions that interpret the Code in ways that reflect sound forest practices. The Board monitors all decisions made by review panels around the province. In addition, it receives requests for reviews and appeals from members of the public.

A Snapshot of Reviews and Appeals, 1995-2001

1995 - Twenty-two licensees requested reviews in 1995, 10 of which resulted in reviews being conducted. The Board requested a review, and made a submission to a review panel, concerning one determination. The Board also filed two appeals to the FAC. The issues raised in the Board's appeals concerned the officials appointed to serve on the review panel, the interpretation of sections of the Code pertaining to environmental damage, and procedural issues.

The Board spent considerable time in 1995 developing its policies regarding reviews and appeals.

1996 - The Board considered 122 determinations in 1996 to judge whether to request administrative reviews. In many cases, the Board's reason for not requesting a review was that the agreement holder had already decided to do so (this meant that the Board would have a subsequent opportunity to consider an appeal).

The Board considered appealing 41 review panel decisions and initiated two appeals, both of which were heard in 1996. The Board also considered becoming a party to 22 appeals initiated by agreement holders. It joined 18 of these appeals, five of which were heard by the FAC in 1996. The first administrative review of a forest development plan was undertaken in 1996.

Five of the appeals the Board participated in before the FAC in 1996 were aimed at clarifying the nature of stop-work orders issued under section 123 of the Act. A number of review panel decisions have equated such orders with findings of contravention – essentially, proven violations. The Board's view, however, is that a stop-work order can be issued when an official thinks a contravention is occurring. The official should not need sufficient evidence to prove that a contravention has actually taken place. In some cases, no contravention may result, but the stop-work order will have been used as a precaution. For this reason, the Board holds that

The Board's reviews and appeals program dealt with a wide range of interpretation- and process-related issues in 1996. Several appeals pertained to issues of due diligence and the liability of agreement holders and their contractors, employees and agents for contraventions of the Code.

government should not record stop-work orders as though they were proof a contravention was committed by an agreement holder or contractor. In a series of cases, the Board has now established that principle in FAC decisions.

1997 - The Board considered 77 determinations made under the Code in 1997. The Board initiated one appeal and became a party to 20 appeals filed by others. The Board participated in 13 hearings before the FAC and one before the BC Supreme Court.

In a number of cases, the Board has advocated for fairness and proper procedure. In 1997, the Board successfully argued to the FAC that if a person takes reasonable care to avoid a Code contravention, and if official actions helped trigger the contravention, the penalty should not economically disadvantage that person. Further, if Crown trees have been taken without authorization, the Crown should be compensated but a diligent person should not suffer a loss in a situation created by government officials.

In 1997 the Board also appealed a review panel decision in which the official who issued a stop-work order was not given the opportunity to reply to the licensee's submissions. This opportunity was denied because of an administrative error. In the end, the Ministry of Forests agreed to change its procedures to avoid such errors in the future.

1998 - The Board considered 31 determinations made under the Code, initiated 2 reviews of the approval of FDPs, joined 7 appeals of review panel decisions filed by others to the FAC and considered 6 requests from the public for reviews of FDP approvals.

The Board participated in 5 hearings before the FAC and received 12 FAC decisions - including decisions from previous hearings. In addition, it participated in 1 hearing before the BC Supreme Court. Another BC Supreme Court appeal was resolved before a hearing took place. The level of activity in 1998 was lower than in previous

One significant case the Board undertook in 1998 involved a regional land-use plan in the Kootenays, which included guidelines to protect the dwindling herds of mountain caribou that inhabit and migrate through the region. A district manager in the area approved an FDP that did not follow the caribou guidelines set out in the regional plan. When concerned citizens asked why, he told them that the cutblocks had been approved in an FDP before the guidelines were in effect.

Local residents asked the Board to request a review of

years, reflecting the general reduction in the number of reviews and appeals being pursued by licensees.

1999 - The Board initiated three appeals to the FAC in 1999, one of which resulted in the penalty being reinstated. The Board initiated one appeal of an FDP and considered appealing five others. It considered appealing or joining as a party to an appeal in 21 review decisions and appeals of determinations made under the Code, and received four FAC decisions where the Board had been a party to appeals filed by others. The FAC also handed down two decisions on reviews requested by the Board.

1999 would mark the first time the government set aside an FDP approval following a Board appeal. In late 1998, the Board challenged an approval of two cutblocks near Government Creek in the Queen Charlotte Islands. The two cutblocks were located in an unlogged watershed that has cultural, traditional, biodiversity, recreationand timber values.

The proposed plan that went out for public review stated that development of the two blocks would be "deferred until a local planning process recommenced." As a result, some people did not comment on the proposed cutblocks because they assumed final approval was not yet being sought for these cutblocks. The Ministry of Forests still gave final approval for the cutblocks, with no provision for deferral.

Following the Board's appeal, the MOF review panel set aside the approval of the two cutblocks, as the Board requested. The panel decided that the licensee had not intended that the cutblocks be finally approved, and that the district manager was wrong to issue the approval. The panel the approval of the FDP. The FAC upheld the approval of the FDP in these circumstances, but in a decision that will be important to future cases, the panel rejected the company's argument that the Board did not have the statutory right to request reviews of FDP approvals on the general question of whether the plan adequately conserves wildlife.

This review process also encouraged the logging company and concerned citizens to negotiate ways in which future development could be planned to reduce impacts on caribou.

2000 - The Board initiated nine files by public request in 2000. It considered 26 administrative review panel decisions and decided to file and appeal in 2 cases. The Board joined as an intervener in three other appeals by licensees. In total, the Board considered 33 review panel decisions and appeals by licensee.

During the year, the Board received and considered five FAC decisions. Two appeals were filed and later withdrawn by the licensee, and another appeal was resolved before a hearing took place. The Board received one BC Supreme Court decision.

Overall, there were fewer government review decisions and fewer licensee appeals in 2000. However, there was an increase in public requests to the Board for FDP reviews.

2001 - The Board considered 28 administrative review panel decisions made under the Code and appealed 2 of those to the FAC. The

spoke to the importance of public review and comment, emphasizing that public consultation is a fundamental Code principle, and that it is important that proposed FDPs present clear and accurate information.

Board also chose to join in four licensee-initiated appeals. Eleven files were initiated by public request, and in two cases, the Board requested a review of the FDP approval. The Board received and considered two FAC decisions.

Back to top

Review and Appeal Successes and Themes 1995-2001

Board reviews and appeals have dealt with a variety of issues, including FDP approvals, the imposition of administrative remedies (penalties, remediation orders and stop-work orders) and issues of fairness and proper procedure. The Board has also pursued cases involving the proper accounting for environmental damage when imposing Code penalties. Three issues – FDP reviews, administrative remedy systems, and ensuring Code penalties reflect environmental damage – have been most prominent for the Board.

Forest Development Plan Reviews

Forest development plans (FDPs) were of primary importance in the implementation of the original Forest Practices Code. As the highest level of operational planning, forest development plans set the direction for all future development. They also offered the public its only legislated right to review and comment on operational plans.

The Forest Practices Board is the only body that has the right to initiate a review of a district manager's decision to approve an FDP, and, if necessary, to appeal the review panel's decision to the FAC. The Board has been extensively involved in the development and interpretation of the FDP process, and has affected change in several ways. Board reviews and appeals have:

- confirmed that FDPs should appropriately take into account regional plans with respect to management of mountain caribou;
- established that public consultation is a fundamental Code principle;
- established that FDPs must present clear, accurate information for the public;
- established that if FDP documents distributed to the public indicate that certain cutblocks are not proposed for final approval, final approval should not be given;
- reversed approval of cutblocks when the district manager had not fully considered whether a citizens group should get an extension of time to examine new technical information;
- pursued reviews and appeals to ensure that FDPs are adequately

managing the needs of threatened marbled murrelets and their habitats, and reversed the approval of cutblocks on the basis that the conservation of murrelets had not been adequately considered; and
- pursued reviews and appeals to ensure that watershed assessments were being properly implemented.

The Board has also successfully persuaded government to change the legislation governing FDP appeals, and to increase the Board's jurisdiction in order to appeal FDPs prepared for the Ministry of Forests small business forest enterprise program.

The new forest and range legislation will replace forest development plans with forest stewardship plans. The Board will be able to appeal decisions to approve forest stewardship plans on behalf of the public.

Administrative Remedy System

The Code set up the administrative remedy system as an alternative to prosecuting offenders in the criminal courts. If concepts from the criminal courts were to apply to contraventions to the Code, cases would be lengthy and complex, fewer could be pursued, and the Code's effectiveness in protecting public forests would be seriously reduced. The Board has consistently opposed importing criminal court concepts into this administrative remedy system.

For example, the Board has dealt with a number of cases that raised the issue of whether the defence of due diligence should be available for administrative penalties. Due diligence allows a person who commits a prohibited act to avoid liability if they can demonstrate that they took reasonable care to follow the law. The Board has taken the position that due diligence should not be available in the case of administrative remedies. Rather, due diligence should be available only when a licensee is being charged with an offence under the Code.

In 1998, the FAC ruled that due diligence is not a defence to administrative penalties, although it can be taken into account when assessing the size of the penalty. This guidance was followed in numerous subsequent cases.

Under new legislation, due diligence will be available as a defence in the future.

The Board has tested the appropriateness of applying other criminal court rules to Code contraventions. Criminal rules are based on the premise that "it is better that 12 guilty persons go free than one innocent be convicted." As a result, criminal law requires that a person be proven guilty beyond a reasonable doubt. However, the Board has opposed using this criminal law standard of proof for administrative penalty proceedings. Civil court standards demand only that proof be established on the balance of probabilities. The criminal law standard is not appropriate in a situation that

cannot result in imprisonment, and when the Crown is primarily regulating persons who have been given the opportunity to do business on public land.

In one case, an individual in the Kootenays was penalized for the unauthorized harvest of Crown timber. The individual appealed, arguing that the government had not proved its case beyond a reasonable doubt. The Board joined government's defence to this appeal, and the FAC agreed with the Board and dismissed the appeal on the grounds that the appropriate standard of proof was civil, not criminal. The individual was found to have illegally cut Crown timber, and the administrative penalty was upheld.

The Board has also successfully argued against allowing technical Charter of Rights defences in administrative penalty proceedings.

Ensuring that Code Penalties Adequately Reflect Environmental Damage

The Board has become concerned about whether officials are adequately taking into account environmental impacts when setting penalties for Code contraventions. Forestry officials are experienced at calculating the value of timber, and they are generally efficient at calculating timber values that have been affected by contraventions. But in some cases, officials appear to not assign value to the environmental and other non-timber values impacted by contraventions.

The Board has initiated a number of review and appeal cases to help ensure that environmental and other values are adequately considered when Code penalties are calculated. In one case, the Board appealed a review decision that concluded that there had been no environmental damage during excessive harvesting of a stream riparian area. The silviculture prescriptions had called for a substantial amount of tree retention along the small fish-bearing streams in order to protect riparian values. The Board argued

Marbled murrelets

The Board has addressed several issues related to the endangered marbled murrelet. One such case arose in the Northwest Graham Island FDP review, which was appealed by the Board and argued in 2000. Requested by a First Nations and environmental group, this review questioned whether marbled murrelets were adequately conserved, and asked when watershed assessments must be done and what must be done.

There was a dissenting opinion in the review panel – the first time this has happened in a case the Board has brought to a panel. The panel decided against the Board, which filed an appeal of the review panel decision with the FAC. The FAC has yet to rule on the appeal.

In 2001, the Board requested a review of the approval of road construction and harvesting of a block in the Slane River valley at the head of Jervis Inlet, on the southern BC coast. A review panel reversed the Ministry of Forests district manager's decision in that case. The Board also continued work on its appeal from the previous year, that a Queen Charlotte Islands FDP did not adequately conserve marbled

that leaving significantly fewer trees than prescribed likely had environmental impacts.

murrelets when it included logging in areas of high importance to marbled murrelets.

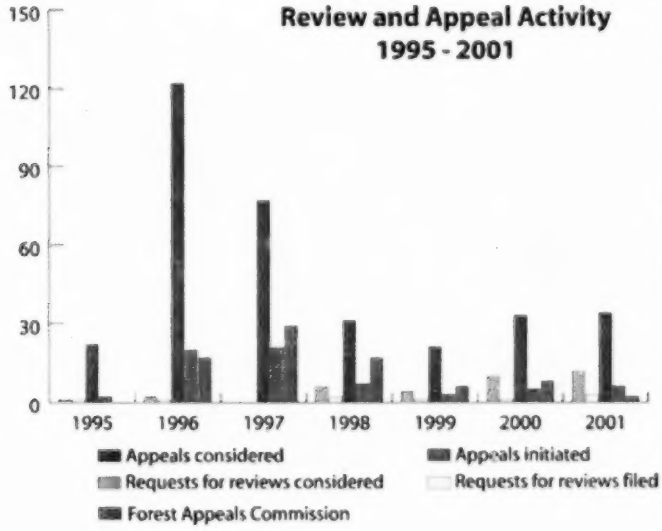
In the end, the Board's appeal to the FAC was successful in restoring the original $13,000 penalty and clarifying that such penalties should reflect both economic and non-economic factors.

In another case a licensee clearcut 800 trees in a wetland riparian area without authorization. The trees that were cut had comprised virtually all of the remaining mature timber on the entire perimeter of the 20-hectare interior wetland. The trees provided significant habitat for a variety of wildlife and, according to an expert, helped maintain the microclimate and wind cover of the wetland.

The district manager imposed a penalty, which the licensee appealed. The review panel sent the case back to the district manager, recommending an approach that reduced the penalty to only one-third of the profit made from the contravention. The Board appealed the review panel decision, arguing that they should have removed all economic benefit, and that a penalty should also have been levied for environmental damage.

In the end a new fine was set at $35,919.38 – about four times the amount stipulated by the original review panel. The new penalty included about $10,000 as compensation to the Crown; $15,000 to remove all economic benefit; and $10,000 for environmental damage.

Back to top



Future Direction

Increased communication is planned for the review and appeal program, to address feedback indicating this part of the Board's work is not well understood, and to address concerns identified through stakeholder consultation.

The focus for the immediate future will be on adapting to the new legislation. This will include implications of the new forest stewardship plans and how the Board should approach its mandate to appeal approvals of these plans; direct appeal to the Forest Appeals Commission, rather than first applying for administrative review, and the implications of the due diligence defence to administrative remedies.

The reviews and appeals section, as a part of the Board that receives requests directly from the public, will continue to provide input into special projects and special reports.

Back to top

For More Information on Reviews and Appeals

The Board's website offers detailed information about the review and appeal process, at www.fpb.gov.bc.ca, including information on how to request a review or appeal.

The cases referenced in this document, and other information about the operation of the Board and its policies and activities, are also available on the Board's website or by contacting the Board directly.

How to Reach Us

If you wish to obtain further information about filing a complaint or about other Board activities, please contact us:
Toll-free phone 1-800-994-5899
Victoria phone (250) 387-7964
Fax (250) 387-7009
E-mail fpboard@gems9.gov.bc.ca
Website www.fpb.gov.bc.ca
Mail PO Box 9905, Stn Prov Govt, Victoria, BC, V8W 9R1

Back to top

Frequently Asked Questions

Is the Board part of the Ministry of Forests?
No. The Board reports to government and to the public on the state of forest practices, but it is an independent agency and does not take direction from the Ministry of Forests or any other government ministry. The Ministry of Forests, the Ministry of Water, Land and Air Protection, the Ministry of Sustainable Resource Management or the Ministry of Energy and Mines, can be the subject of complaint investigations or audits by the Board.

What is the background of Board members?
Members of the Board have experience in a variety of fields, including the

forest industry, auditing, resource management, and First Nations consultation. This diversity is important in ensuring that Board members are familiar with a broad range of issues. It also helps ensure a balanced, objective approach in monitoring forest practices.

What is the background of the Board's reviews and appeals staff?
Two staff lawyers and a law student from the University of Victoria are the professional staff who conduct Board reviews and appeals.

What can the Board's reviews and appeals section do?
The Board can review and appeal approvals of forest development plans, range use plans and amendments. It can also review and appeal determinations or failures to make determinations regarding certain administrative remedies and orders (penalties, remediation orders). Under new legislation it will be able to appeal forest stewardship plans and amendments.

Can the Board order forest companies or the government to take action?
No. However, the Board can appeal to review panels and the Forest Appeals Commission, which can issue legally binding penalties and orders.

Does the Board always need a request before it can undertake a review or appeal?
No. The Board sometimes initiates reviews or appeals on its own initiative, after becoming aware of a situation through its oversight of review panel decisions or otherwise.

Back to top